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No. 128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

THE COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA, a Body Corporate, et al., *Appellants*,

vs.

STATE MILK COMMISSION

Appeal From the Supreme Court of Appeals of the Commonwealth of Virginia.

BRIEF FOR APPELLEE.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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vs.

STATE MILK COMMISSION

Appeal From the Supreme Court of Appeals of the Commonwealth of Virginia.

BRIEF FOR APPELLEE.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Appellee, State Milk Commission of the Commonwealth of Virginia, by its counsel, respectfully urges that the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia be affirmed for the reasons hereafter stated.

OPINIONS BELOW.

The opinions of the lower courts are not reported. The two opinions of the Circuit Court of the City of Richmond appear in the Record on pages 50-52 and 100-101.

The order of the Virginia Supreme Court of Appeals refusing an appeal and affirming the decision of the Circuit Court of the City of Richmond appears in the Record at page 148.

JURISDICTIONAL STATEMENT

The appellants claim that this Court has jurisdiction to review the decision of the Supreme Court of Appeals of Virginia by virtue of Title 28, U. S. Code, Section 1257.

Appellee took the position that the question was not substantial under this Honorable Court's Rule 12. This Court noted probable jurisdiction October 12, 1953.

To the question whether the issue presented is substantial should be added the question whether the appellants have standing to sue, or to prosecute this appeal.

While allegations of some small interest in the question were made in paragraph two of the petition (R. 1), this was denied by the answer. (R. 49) Appellants offered no evidence in support of their allegations, or in support of their claim to be interested parties. (R. 70-100) The appellants assert on page 7 of their brief that Arlington County Board appropriates money to buy milk for schools and jails, citing the record at pages 1 to 5 and at page 74.

Pages 1 to 5 are the petition, all of the material allegations of which as to this question, are denied in the answer (R. 49-50). Page 74 contains, with respect to this question, merely the fact that various, distributors *bid* for contracts to provide milk to "public in titutions and schools." Bidding is, of course, just the opposite of selling at a fixed price.

It is submitted that the appellants have insufficient legal right or interest to give them standing to prosecute this appeal suing either as the County Board of Arlington County, Virginia, *Smith* v. *Indiana*, 191 U. S. 138, *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 393; *Trenton* v. *New Jersey*, 262 U. S. 182, or, individually, as private citizens. *Moffat Tunnel League* v. *United States*, 289 U. S. 113, *Fairchild* v. *Hughes*, 258 U. S. 126; *Edward Hines Yellow Pines Trustees* v. *United States*, 263 U. S. 143. Appellants are not subjected by the Order of the Commission to any legal injury either actual or threatened. *Edward Hines Yellow Pines Trustees* v. *United States, supra.*

In view of the above, and for the reasons previously presented in the statement opposing jurisdiction, the appellee respectfully adheres to its position that this Honorable Court should dismiss this appeal.

COUNTER STATEMENT OF THE CASE.

A typical dairy, (R. 78, 80, 81, 82, 87) Chestnut Farms Dairy, sold at wholesale and retail in this market 13.77% of its total sales (R. 73, 77) and sold 33% of the total sales in this area. (R. 73) Chestnut Farms Dairy purchases milk from Virginia, Maryland, West Virginia and some from Pennsylvania. (R. 73, 98) It purchased 46.09% of its total purchases in the State of Virginia. (R. 73) Chestnut Farms Dairy purchased from Virginia 53.45% of all the milk that was purchased in Virginia by all distributors in the Arlington-Alexandria and Manassas market area and the District of Columbia. (R. 73) 28.09% of all its Virginia purchases was sold by Chestnut Farms Dairy in this market area. (R. 73)

The Virginia milk purchased by Chestnut Farms was processed, along with all other milk purchased, at its plant in the District of Columbia. (R. 73, 75) The milk and other dairy products thus processed were loaded on trucks at its plant in the District of Columbia and sales were made from these trucks in this market area both at wholesale and at retail. (R. 73, 74, 79)

Chestnut Farms operates 15 or 20 truck routes in the Arlington market area. (R. 73) The drivers in charge of the trucks are in reality salesmen and solicitors. These men solicit from door to door and from store to store selling their product. (R. 74, 80, 82) They are paid on a commission basis with a guaranteed minimum salary. (R. 80, 91) When the driver starts out with his truck in the morning he does not know the volume that he will sell that day. (R. 73, 75, 81) He sells to the stores whatever the store manager or store owner elects to buy that day. (R. 74, 75, 81) He usually makes his collections daily from the stores or restaurants and collects from the various doorstep deliveries weekly or monthly. (R. 73, 74) It is the practice of the Chestnut Farms to keep additional trucks ready at the plant to supply the emergency sales made by the various truck driver-solicitors in excess of their truck

loads. (R. 74, 75) The driver 'phones in and meets his new supply at an appointed place and the driver-solicitor proceeds from there for his additional sale. (R. 74, 75) True it is that the doorstep home owner consumer is more regular in his purchases to the extent that there is usually a standing order for one or two quarts, etc., but even these are increased or entirely cut off from time to time by notes or memoranda at the doorstep. (R. 74-81) The driver-solicitor leaves a bill at the doorstep and is paid at the doorstep and keeps his own book of account and records in his truck. (R. 82) It is true that there are some substantial number of individual consumers who send monthly checks direct to Chestnut Farms Dairy in Washington in payment of their milk bills. (R. 82) Collections for practically all wholesale sales are made in Virginia. (R. 82) It is true also that Chestnut Farms Dairy does not have a processing plant or a receiving plant in the State of Virginia or in this market. (R. 73, 75) For all practical purposes the truck is the store from which the sales are made and the driver is the solicitor, salesman and store clerk through whom the merchandise is sold and delivered to the consumer or customer and payment is made therefor. (R. 73-75, 80-82) Approximately 50% of the total milk sold by Chestnut Farms Dairy in this marketing area in Virginia is sold at wholesale and 50% at the doorstep. (R. 79)

In the year 1950 Chestnut Farms Dairy paid an income tax to the State of Virginia in the sum of $16,333.00 on business done in Virginia. (R. 75) In addition it paid for business and store licenses on the trucks the sum of $6,762.00. (R. 75) Items of similar amounts have been paid for many years. (R. 75) The District of Columbia for many years through its taxing authority has recognized this volume of business as done in Virginia and has not taxed that volume as business done in the District of Columbia. (R. 75) The record indicates that Thompson's Dairy, the next largest dairy in this area, operates in the same fashion buying 55% of its total milk in Virginia and selling 23% of its total sales in this market area. (R. 99)

The Lucerne Milk Company, which is a trade name for the milk division of Safeway Stores, (R. 89) receives its milk from shippers in Maryland and Virginia through the Maryland and Virginia Milk Producers' Association at its plant in the District of Columbia. (R. 88) The milk is processed there and packaged. (R. 88) Safeway transports milk from its District plant to its Virginia stores. (R. 88, 89) It sold in this market area 17.09% of its total milk sales. (R. 99) It sold 10½% of all Virginia sales and purchased from Virginia producers 15.03% of its total purchases of milk. (R. 99) Its Virginia sales amounted to 116.9% of its Virginia purchases. Safeway has no milk routes in Virginia but distributes all of its dairy products direct to retail customers coming to its stores. (R. 90) Safeway operates its trucks that deliver the milk from the Washington processing plant to its various stores in Virginia on the same commission basis for the truck driver as route salesmen and wholesale drivers of other distributors. (R. 90, 89)

Chestnut Farms Chevy Chase Dairy, Thompson's Dairy, Lucerne Milk Company, the Milk Division of Safeway Stores are the principal distributors who offered testimony in this proceeding. They raised no question of the right of respondent to fix minimum prices nor did they or do they contend that the fixing of a minimum sales price is a burden on them or on interstate commerce.

The testimony indicated that both wholesale and retail sales by distributors took place in Virginia (R. 77, 79), and the Circuit Court so found. (R. 101).

SUMMARY OF ARGUMENT.

I.

The sales affected by the Milk Commission order, sales from trucks in Virginia, are part of local, not interstate commerce. *Wagner* v. *Covington*, 251 U. S. 95; *Caskey Baking Company* v. *Virginia*, 313 U. S. 117.

II.

The decisions below sustained the validity of the Arlington-Alexandria Market Order No. 4, promulgated by the Virginia State Milk Commission, (R. 32) and held (1) that the Commission had the power to fix the minimum sale price of fluid milk sold and delivered to consumers in the Arlington-Alexandria Market Area from trucks of District of Columbia distributors, and (2) that the regulation in question does not constitute an unconstitutional burden on interstate commerce. (R. 100-101, 148)

It is submitted that the lower courts' decisions are correct and are supported by this Court's decisions in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, and *Milk Control Board* v. *Eisenberg*, 306 U. S. 346, and are not contrary to other of this court's decisions dealing with the effect of the commerce clause on state milk control legislation.

The instant regulation affects interstate commerce, if at all, only incidentally, and does not impose an undue burden thereon. It is not hostile to interstate commerce either in purpose or effect. It is non-discriminatory, applying equally to all transactions made in the market area regardless of the point of origin of the milk involved. There is consequently nothing about it which could even remotely be equated to a trade barrier which would invite or encourage rivalries and reprisals—the evils sought to be averted by the commerce clause. It bestows no local benefit by the imposition of attendant burdens on those without the state. Nor can it be said that as a practical matter it curtails the volume of interstate traffic.

The enforcement of the regulation as to *all* milk sold in the state of Virginia is vital to the interest of that state in effectively controlling its milk industry, an end held constitutionally legitimate in *Nebbia* v. *New York*, 291 U. S. 502. On the other hand, the effect of so enforcing the regulation on the national interest in maintaining the free flow of interstate commerce is, if any, negligible, and certainly not adverse. A balancing of these interests clearly points to the correctness of the decisions below and they should, therefore, be affirmed.

III.

The Federal Agricultural Marketing Agreement Act of 1937 does not preempt the field of milk regulation to the exclusion of the states.

That Act is presently inoperative in the Arlington-Alexandria area and cannot become effective until so ordered by the Secretary of Agriculture. The validity of the order of the State Milk Commission is totally unaffected by the Federal Act.

Assuming, *arguendo*, that the Act was operative, the same result would obtain. The Act specifically provides for state and federal cooperation and contemplates coexistence of state and federal programs. The Act, as construed by this Court in *Parker* v. *Brown*, 317 U. S. 341, would seem to completely answer appellants' contentions.

In addition, the federal administrative practice is entirely in accord with appellee's contentions herein.

ARGUMENT.

I.

Sale of Milk From the Trucks in Virginia Is Not Interstate Commerce.

When the instant proceeding was first heard in the Circuit Court that court found that there was insufficient factual basis for a ruling as to the claim that the order affected interstate commerce, and remanded the case to the Milk Commission for the taking of additional testimony. (R. 51) Petitioners, appellants here, offered no evidence on remand, although the other parties did, upon which evidence appellee's counter-statement, *supra*, is based. (R. 70-99) After that testimony was taken and certified to it, the Circuit Court made the following finding and conclusion, based on the facts of this case (T. 101):

> "Under the authorities cited therein as applied to the minimum price regulation in question is not a the facts of this case, the Court is of the opinion that

> burden on interstate commerce; that the State Milk Commission can legally fix the minimum sale price of fluid milk *sold and delivered to consumers* in the Arlington-Alexandria Market Area *from trucks* of the District of Columbia distributors and that Arlington-Alexandria Market Order No. 4 should be sustained." (Emphasis added.)

This decree, the Supreme Court of Appeals of Virginia held to be "plainly right." (R. 148)

It is clear, therefore, that the facts as presented on this appeal are limited strictly to sales made from trucks in the State of Virginia. It is the contention of appellee that the regulation of the price charged in such sale is not a burden on interstate commerce, because such a transaction is local, and not a part of interstate commerce. While the milk sold, it is conceded, was in interstate commerce prior to sale, such interstate commerce ceased prior to the sales which were considered by the Courts below.

What happens in the case of these truck sales may be analogized to very similar transactions which, the record here shows. (R. 88-90) These were sales by Safeway Stores from their stores located in Virginia of milk processed in the District of Columbia, transported to Virginia, and sold through the stores, all by one corporation. The sale to the customer in the store is clearly local and not a transaction in interstate commerce. Such commerce ceases after the goods come to rest in the stores, and prior to sale.

The same may be said as to the truck sales. When the trucks transport the milk from the District of Columbia across the line to Virginia they are, of course, engaged, in interstate commerce. But when, having reached their destination, a particular area or route, they commence to circulate through such area offering the milk for sale, they become a sort of moving store. The transactions which then take place are just as local as the sales from the Safeway Stores. Because the sales platform is moving,

and not stationary would be a highly technical and unreasonable differentiation.

An almost identical case to that presented on this appeal was *Wagner* v. *Covington*, 251 U. S. 95. In that case plaintiffs, manufacturers of soft drinks in Cincinnati, Ohio, sold in Covington, Kentucky, from their vehicle to various purchasers such soft drinks as the purchasers might need from time to time. The trucks carried sufficient drinks to meet the probable demands of customers but with the exception of occasional small amounts carried for delivery in response to particular orders previously received at plaintiff's plant of business in Cincinnati, all of the sales in Covington were made from the vehicle of the driver. Sometimes the driver sold his entire supply or only part of it. The sales were made in the bottles as filled in Ohio. The driver collected cash from time to time from his customers. The statement of facts in this case is almost identical with the testimony in the case at bar. In upholding the right of the City of Covington to tax the plaintiffs and to recover license fees from them under certain city ordinances the Court said beginning at p. 101:

> "If in respect to this portion of their business, Plaintiffs may be subjected to the regulatory power of the state acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from state to state might be repugnant to the Federal Constitution.
>
> "From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of intinerant vendor or peddler,—a travelling from place to place within the state, selling good that are carried about with the seller for the purpose. * * *
>
> "*Of course, the transportation of plaintiffs' goods across the state line is of itself Interstate Commerce; but it is not this that is taxed by the City of Covington, nor is such Commerce a part of the business that it taxed, or anything more than a preparation for*

> *it.* So far as the intinerant vending is concerned, the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they made them the subject of local commerce, and this being so, *they can claim no immunity from local regulations, whether the goods remain in original packages or not.*" [p. 103] (Emphasis supplied.)

The case of *Caskey Baking Company* v. *Virginia*, 313 U. S. 117, decides the same question with respect to bread brought from West Virginia bakeries and sold in the state of Virginia. See also: *Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506.

Under the authority of these decisions, it would seem clear that sales from trucks in the State of Virginia are part of local, not interstate commerce and the distributors "can claim no immunity from local regulations, whether the goods remain in original packages or not:"

II.

The Minimum Price Regulation of the State Milk Commission Does Not Lay An Unconstitutional Burden On Interstate Commerce and the Decisions Below In So Holding Are Supported by Highland Farms Dairy v. Agnew and Milk Control Board v. Eisenberg and Are Not Contrary to Other Decisions of This Court.

This Court in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608 (1936) ruled, *inter alia*, that the Virginia Milk and Cream Act does not lay a burden on interstate commerce. The situation in respect of that ruling, pertinent here, was as follows.

Highland Farms Dairy operated a creamery for the pasteurization and treatment of milk in the District of Columbia. This milk it purchased from Virginia and Maryland farmers. The *entire output* of its bottled milk it sold to Luther W. High, a resident of the District of Columbia, who in turn sold the bottled milk from retail stores which he operated in Virginia. Highland delivered the milk to High's Virginia stores by truck (see 3-judge District

Court's Opinion, 16 F. Supp. 577, 579). Neither High nor Highland complied with the licensing provisions of the Virginia Act, and they likewise ignored the minimum price regulations promulgated thereunder by the Virginia State Milk Commission. After High was threatened by the Commission with enforcement proceedings, both High and Highland, as plaintiffs, sued for an injunction to restrain the enforcement of the Act. As to Highland, this Court said in its statement of the case at page 611:

> "No proceedings against Highland were even begun or threatened, the Commission taking the position that Highland was not subject to the prohibitions of the statute, its sales and purchases in Virginia being transactions in interstate commerce."

The opinion on the interstate commerce question was as follows, pp. 614-616:

> "3. The statute does not lay a burden on interstate commerce.
>
> "Argument to the contrary is built upon the definition of the word 'distributor' contained in § 1. We learn from that section that distributors include 'persons wherever located or operating, whether within or without the Commonwealth of Virginia, who purchase, market, or handle milk for resale as fluid milk in the Commonwealth of Virginia.' This definition, we are told, takes in the plaintiff Highland, who buys Milk and sells it in interstate commerce, and does so with the expectation that upon arrival in Virginia the milk will be resold. But Highland is not subject to the provisions of the Act, and so the Milk Commission has ruled. *No matter what the definition of a distributor may be, sales are not affected by any restriction as to price unless made within the boundaries of a designated market area.* * * * Highland in Washington may sell to High in Virginia, and High may buy from Highland, at any price they please. *Not till the milk is resold in Virginia within a market area* will the price minimum apply and then only to the price to be charged on the resale. *Cf. Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 175; *Sonneborn Bros.* v. *Cureton*, 262 U. S.

506; *Baldwin* v. *G. A. F. Seeling, Inc.*, 294 U. S. 511. If there could be any doubt about this as a matter of construction the doubt would be dispelled by the administrative practice and by the warning of the statute, express in § 14, that operations in interstate commerce shall not be deemed to be affected. So also as to the requirement of a license expressed in § 4. High needs a license to the extent that he sells at retail to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business is interstate exclusively. Clumsy draftsmanship may have spread a fog about the section when viewed in isolation or taken from its setting. The fog scatters when we recall the provisions of § 14 and the administrative practice. Appellants' fears are visionary." (Emphasis supplied.)

In the instant case, District of Columbia distributors, whose raw milk is purchased from producers in Virginia, West Virginia, Maryland and Pennsylvania (R. 73, 98), sell and deliver their processed milk to consumers, restaurants, schools, stores (R. 74) in Virginia, on both a retail and wholesale basis. (R. 77, 79) The appellant interprets the *Agnew* case to hold that such operations are in interstate commerce and, hence, are not subject to the provisions of the Act. It is submitted, however, that *Agnew* properly interpreted, supports the position of the respondent herein. It held that sales made in the "market area" were subject to the Virginia's minimum price, and that if a sale of milk is made in the District of Columbia the Virginia Act does not apply to that sale regardless of the fact that the milk is delivered to the purchaser in Virginia. It is only when the milk is sold in Virginia that Virginia's Act governs. *Agnew* then may fairly be construed to mean that when milk is sold wholesale or retail outside the State of Virginia and later transported therein, the initial sale is unaffected by the Virginia Act and, conversely, if milk is sold wholesale or retail *in* the State of Virginia, the Act governs those sales.

Appellants assert on page 9 of their brief that the *Agnew* case held that the Virginia Act "did not regulate sales from District of Columbia distributors to Virginia stores". The implication of that assertion is that where the transactions between the store and the distributor take place in Virginia, the act does not apply. Such an interpretation of *Agnew*, it is submitted, is improper. It was specifically said in *Agnew* that:

> "* * * sales are not affected by any restriction as to price unless made within the boundaries of a designated market area." (Pp. 614-615)

It follows, then, that as to a wholesale transaction between a store and a District of Columbia distributor which occurred in the District of Columbia, as was the situation in *Agnew*, the Act does not apply, but where the transaction takes place in Virginia, the Act does apply. This interpretation of the *Agnew* case is entirely in accord with the present administrative practice of the State Milk Commission. The Commission said (R. 95):

> "As far as sales from distributors to either stores or homes, doorstep deliveries, we consider any such transactions as may occur within the Arlington-Alexandria market area as defined in the regulation to be under the control of the Milk Commission and to come within the scope of these regulations as regards the pricing as set forth in the regulation."

It is submitted that appellants are in error when on page 13 of their brief they say that the above stated position of the Commission is an "about face" departure from its position taken in the *Agnew* case. The position of the Commission now is the same as it was then. *Agnew*, as has been demonstrated above, held that Highland's milk sold to High *in Washington* was not subject to the act, and in respect of the administrative practice the Court said, page 615:

"If there could be any doubt about this as a matter of construction, the doubt would be *dispelled by the administrative practice* and by the warning of the statute, expressed in § 14, that operation in interstate commerce shall not be deemed affected * * *. High needs a license to the extent that he sells to consumers in Virginia. Highland does not need one, and the Commission is not asking it to apply for one, because its business as now conducted with persons in Virginia is interstate exclusively."[1] (Our emphasis.)

---

[1] Some confusion, however, was injected in this matter by the word "sales" as used by the court in *Agnew* when it said on page 611:

> "No proceedings against Highland were begun or were threatened, the Commission taking the position that Highland was not subject to prohibitions of the statute, its *sales* and purchases in Virginia being transactions in interstate commerce." (Emphasis supplied.)

That the fact that the transaction of sale occurred in Washington controlled the decision in *Agnew* is apparent from a reading of the entirety of the opinion of this Court and that of the three-judge District Court. The latter, 16 F. Supp. 575, summarized plaintiff's contention in part as follows, page 580:

> "(V) The Act and the regulations passed by the Milk Commission are invalid because they constitute an interference on the part of the state with interstate commerce in that (1) they required the Highlands Farms Dairy, a corporation of the District of Columbia, *doing no business in Virginia* to secure a license in order to engage in interstate commerce; (2) and fixed the prices to be paid by High to Highland Farms Dairy for milk sold to him by the corporation *in the District of Columbia*, and (3) authorized the Commission to levy an assessment on milk shipped in interstate commerce." (Emphasis supplied.)

And on page 579 the Court said:

> "The bottled milk distributed by High in Virginia is sold to him *in the District of Columbia* but is delivered to his Virginia stores by the dairy trucks upon orders received by telephone." (Emphasis supplied.)

And on page 588,

> "* * * but when it is borne in mind that [Highland] is not required by the Act to be licensed or to sell at prices fixed

Indeed, Chestnut Farms Dairy is taxed by the State of Virginia on the income received from business done therein, which business is the distribution of milk involved in this case. (R. 75) Chestnut Farms also pays the State of Virginia for business and store licenses on its trucks used in that distribution. (R. 75)

In view of the foregoing it is submitted that the *Agnew* case is clear authority in support of the rulings of the courts below.

In *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511 (1935), a New York milk dealer, G. A. F. Seelig, purchased its milk from a creamery in Vermont which in turn was supplied by Vermont producers. The milk was transported to New York in forty-quart cans. In New York 90% of the milk was sold to consumers in the original cans, the remaining 10% being bottled there and sold to consumers in bottles. "By concession" title passed from the creamery to Seelig in Vermont. The New York Milk Control Act and regulations thereunder fixed minimum prices to be paid by dealers to producers. A provision of the Act prohibited the sale of milk in New York which had been purchased elsewhere "unless the price paid to the producers was one that would be lawful upon a like transaction within the

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by the Commission, since it is located in Washington and is not a distributor in any market designated by the Commission, it is seen that the Act does not forbid High from purchasing milk *from the dairy in the District of Columbia* or fix the price which he shall *there* pay." (Emphasis supplied.)

In addition, the District Court said that the Act would "doubtless" be "invalid as a direct and unconstitutional burden on interstate commerce" *if* the Act were given the meaning ascribed to it by the plaintiffs. In so concluding, the Court relied upon this Court's decision in *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511. In that case it was conceded that title to the milk passed to the distributor in a state other than the state whose legislation (which was held unconstitutional) forbade the sale of that milk because it has been acquired by the distributor from foreign producers at a price less than that which it could have lawfully been purchased for from domestic producers.

state". The price paid by Seelig to the Vermont Creamery was lower than the minimum price payable to producers in New York. Because it refused to agree to comply with the Act, Seelig was refused a license and, electing to sell the milk without a license, sued to enjoin the enforcement of the Act. This court enjoined the enforcement of the Act both as to the milk sold in the original cans and that sold in bottles on the ground that the Act directly burdened interstate commerce. The court said on pp. 521-22:

> "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there. So much is not disputed. New York is equally without power to *prohibit the introduction within her territory* milk of wholesome quality acquired in Vermont, whether at high prices or low ones. This again is not disputed. Accepting those postulates, New York asserts her power to *outlaw* milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers of Vermont is less than would be owing in like circumstances to farmers in New York. *The importer* in that view may keep his milk or drink it, but sell it he may not.
>
> "Such a power, if exerted, will set up a *barrier* to traffic between one state and another *as effective as if customs duties*, equal to the price differential, had been laid upon the thing transported. * * * 'It is the established doctrine of this court that a state may not in any form directly burden the prosecution of interstate business.' *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112; and see *Brennan* v. *Titusville*, 153 U. S. 289; *Brown* v. *Houston*, 114 U. S. 622; *Webber* v. *Virginia*, 103 U. S. 344, 351; *Kansas City Southern Ry. Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 79. Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed *purpose* of the *obstruction*, as well as its *necessary tendency*, is to *suppress* or *mitigate* the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. * * * A chief occasion of the commerce clause was

'the mutual jealousies and aggression of the states, taking form in customs barriers and other economic retaliations. * * * if New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to *rivalries* and *reprisals* that were meant to be averted by subjecting commerce between the states to the power of the nation." (Emphasis supplied.)

And beginning on page 524:

"* * * the *exclusion* of milk paid for in Vermont below the New York minimum will tend, it is said, to impose a higher standard of quality and thereby promote health. We think the argument will not avail to justify *impediments* to commerce between the states." * * * [Page 527] "What is ultimate is the principle that one state in its dealings with another may not place itself in a *position of economic isolation.* * * * Neither the power to tax nor the police power may be used by the state of destination with the *aim and effect* of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a *rampart* of customs duties designed to neutralize the advantages belonging to the place of origin. * * * [Page 528] It is one thing for a state to exact adherence by an importer to fitting standards of sanitation before the products of the farm or factory may be sold in its markets. It is a very different thing to establish a wage scale or a scale of prices *for use in other states* and to bar the sale of the products, whether in the original packages or in others, unless the scale has been observed." (Emphasis supplied.)

The *Seelig* case has no application here because in that case, as demonstrated above, there was (1) discrimination present; (2) the New York Act sought by indirection to regulate producer prices in other states; and (3) to enforce that Act would in effect establish a direct bar or

barrier against competition with products of another state.

Here there is no discrimination [2] against milk from other states. The application of the minimum sale price in Virginia is equal and universal as to all milk received by wholesaler, retailer or consumer in their respective classifications. There is no exclusion or limitation. There is no barrier against competition and consequently nothing to invite or encourage rivalries and reprisals sought by the commerce clause to be averted. "A tariff barrier between states, moreover, presupposes a purpose to prefer those who are within the barrier; where no such preference appears there can be no justification for reprisals and there is consequently little probability of them." (Frankfurter, J., dissenting in *Hood & Sons* v. *DuMond*, 336 U. S. 525, 570). No such preference appears here. It cannot be said that the price fixing order of the State Milk Commission will in its practical operation work discrimination against interstate commerce. The appellants say only (page 7 of their brief) that:

> "The [Arlington] county is competitive with other parts of the Washington Metropolitan area, and its prosperity requires that it be free from restraints not imposed in other areas. As elected representatives of the people and responsible to them and spending tax funds, it brings this appeal to carry out its statutory functions of bringing suit to protect the general welfare of its people."

The fixing of a minimum selling price of fluid milk under the Virginia Act, Title 3, 1950 Code of Virginia, Section

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[2] In this connection it is apparent from the following language of this court in *Seelig* that the effect of that case herein, if any, is to decide the contentions of appellants against them. The court said on page 526:

> "A state tax upon merchandise brought in from another state, or upon its sales, whether in original packages or not, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminatory in its incidence against the merchandise because of its origin in another state. *Sonneborn Bros.* v. *Cureton*, . . . at p. 516."

359 (See Appendix A, Appellants' brief), and regulation (R. 32) does not in purpose or effect regulate prices elsewhere, but, on the contrary, has exclusively local application in furtherance of the regulation and control of the milk industry of the state, the power to do which was held constitutional in *Nebbia* v. *New York*, 291 U.S. 502.

The *Nebbia* case held that it was within the police power of the state of New York to fix the selling price for milk. The reasons given in that case why the milk industry is such that it inherently requires special methods of control should, we think, be here reproduced verbatim, even at the risk of a rather long quotation. This Court said beginning at p. 517:

> "The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.
>
> "In addition to the general price decline, other causes for the low price of milk include a periodic increase in the number of cows and in milk production, the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets, and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.
>
> "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several

factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milk-shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment.

"Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

"The legislature adopted Chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves through the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry.

• • • • • • • • • • •

"The milk industry in New York has been the subject of long-standing and drastic regulation in the public interest. The legislative investigation of 1932 was persuasive of the fact that for this and other reasons unrestricted competition aggravated existing

evils and the normal law of supply and demand was insufficient to correct maladjustments deterimental to the community. The inquiry disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price cutting and reduced the income of the farmer below the cost of production. We do not understand the appellant to deny that in these circumstances the legislature might reasonably consider further regulation and control desirable for protection of the industry and the consuming public. That body believed conditions could be improved by preventing destructive price-cutting by stores which, due to the flood of surplus milk, were able to buy at much lower prices than the larger distributors and to sell without incurring the delivery costs of the latter. In the order of which complaint is made the Milk Control Board fixed a price of ten cents per quart for sales by a distributor to a consumer, and nine cents by a store to a consumer, thus recognizing the lower costs of the store, and endeavoring to establish a differential which would be just to both. In the light of the facts the order appears not to be unreasonable or arbitrary, or without relation to the purpose to prevent ruthless competition from destroying the wholesale price structure on which the farmer depends for his livelihood, and the community for an assured supply of milk. [P. 530]

* * * * * * * * * * *

"But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments by legislation touching prices? We think there is no such principle. [PP. 531-2]

The above makes it crystal clear that the ability efficiently to control its milk industry is of vital concern to the State of Virginia. Efficacious regulation of the industry demands that the state have the power to enforce the minimum sale price as to *all* milk sold within its borders. The effect of the exercise of such a vitally needed state power upon the broad national interest in an unobstructed flow of

interstate commerce, if any, is insignificant. A balancing of such state and national interests clearly requires that the judgment below be affirmed.

In *Hood & Sons* v. *DuMond*, 336 U. S. 525, petitioner Hood, a distributor of milk in Massachusetts who operated three receiving plants in the State of New York, sought a license from that state for the operation there of a fourth in furtherance of its distribution of milk in Massachusetts. Pursuant to a provision of the Agricultural & Marketing Law of New York the issuance of the license was forbidden if the Commissioner should find that issuing it would tend to a destructive competition in a market already adequately served and would not be in the public interest. The Commissioner so found and denied the license, stating, *inter alia*, as a further reason for the denial, that granting the license would draw off local milk badly needed in local markets. The Court of Appeals of New York sustained the Commissioner. This Court reversed on the ground that the New York law violated the Commerce Clause of the Federal Constitution, specifically holding that New York did not have the power to deny additional facilities to acquire and ship milk in interstate commerce where the grounds of the denial are that such limitation upon interstate business will protect and advance local economic interests. In so holding the Court saw the "erection of a barrier to traffic between one state and another" with the resultant evil effects condemned in the *Seelig* case, which case the Court said presented the "converse of the present situation". The Court discountenanced the restriction as one "imposed for the avowed purpose and with the practical effect of curtailing the *volume* of interstate commerce to aid local economic interests".

Obviously the situation in *DuMond* is totally unlike that in the instant case. There is no curtailment of the volume of interstate commerce even alleged here. There is no barrier to interstate traffic. The practical effect of the Act and regulations is not to exclude milk from the Dis-

trict of Columbia. They do not express hostility toward those engaged in interstate commerce or practically obstruct its conduct. Indeed District of Columbia distributors sell ⅔ of the total milk sold in the Arlington-Alexandria market. (R. 86, 99)

It seems appropriate here to point out that this court has said that undisputed generalities about the freedoms of commerce from state encroachment are not determinative of the question of the fate of state legislation in cases where interstate commerce interpenetrates the states. The question must be resolved by the weight of the circumstances and the practical and experienced judgment in applying those generalities to the particular instances. The problem is to harmonize national and state interest without sacrificing either. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 212. And in *Parker* v. *Brown*, 317 U. S. 341, 362, this Court said:

> "Such regulations are to be sustained, not because they are 'indirect' rather than 'direct', see *Di Santo* v. *Pennsylvania*, 273 U. S. 34 . . . *cf. Wickard* v. *Filburn*, 317 U. S. 111 . . ., not because they control interstate activities in such a manner as only to effect the commerce rather than to command its operations. But they are upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of safety, health and well being of local communities, and which because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress."

It is submitted that the interests of the State of Virginia to be served by the minimum milk price regulation as administered by the State Milk Commission are great. If so-called "interstate commerce milk" could be brought in from other states and sold on a cut-price basis in Virginia, the state would soon be a dumping ground for surplus milk at various seasons and the whole price structure would

be destroyed. The State of Virginia would be wholly unable to protect the very industry that the *Nebbia* case says it has a right to protect. On the other hand, it cannot be said, as a practical matter, that the effect, if any, of the regulation upon the national interest in the freedom of interstate commerce is any more than innocuously trivial.

Appellants contend neither that there is too much nor that there is too little competition in the Arlington market area. They simply want District of Columbia distributors to be allowed to engage in unrestricted competition with Virginia milk in the hope that milk will then be cheaper than it is. But if such were allowed to occur, not only would the regulation of the state milk industry be seriously impaired, but as regards the residents of Arlington and Alexandria, the benefit of cheaper milk today may well be illusory because of the likelihood of its resulting in more expensive milk tomorrow, should such unrestricted competition place some one District of Columbia distributor in control of the market. Indeed the very purpose behind milk control laws is to prevent price-cutting and other destructive and demoralizing trade practices which accompany unrestricted competition in the milk industry.[3]

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[3] In this connection this Court's attention is respectfully directed to the language of the preamble of the Virginia Milk and Cream Act.

> "Whereas, the production and distribution of milk and cream is an industry upon which, to a substantial degree, the prosperity and health of the people of the Commonwealth of Virginia depend; and the present economic emergency is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminished the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth and local political sub-divisions thereof; and
>
> "Whereas, unhealthful, unfair, unjust, destructive and demoralizing economic trade practices have grown up, and are now carried on in the production, sale and distribution of milk, and milk and cream products in the Commonwealth, which

Again, if the *DuMond* case is applicable here at all, it supports the contention of the respondent by reason of the following language from that case at page 529:

> "Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests has long been recognized and is from a constitutional standpoint hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. There have evolved detailed, intricate and comprehensive regulations, including price-fixing. They have been much litigated but were generally sustained by this court as within the powers of the state over its internal commerce, as against the claim that they violated the Fourteenth Amendment."

Of the decisions of this Court which have ruled upon the validity *vel non* under the commerce clause of state milk control legislation, it is submitted that the rulings of the courts below are supported not only by *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, *supra* (as has already been demonstrated), but also by *Milk Board* v. *Eisenberg*, 306 U. S. 346.

In that case Eisenberg Co., a milk dealer, purchased milk from producers in Pennsylvania and there placed it in receiving tanks preparatory for shipment into New York

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impair the dairy industry in the Commonwealth, and the constant supply of pure wholesome milk to the inhabitants thereof, and constitute a menace to the health and welfare of the inhabitants of the Commonwealth; and

"Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth in the manner hereinafter provided; now, therefore, * * *". Acts of Assembly of Virginia, 1934, Chapter 357.

for sale there. The Pennsylvania Milk Act *inter alia* fixed the prices to be paid by milk dealers to producers for milk. The statute defined a milk dealer as any person who purchases or handles milk within the Commonwealth for sale, shipment, storage, processing or manufacture *within* or *without* the Commonwealth. Eisenberg Co. contended that it need not comply with the statute because its milk was in interstate commerce and the Act, if applicable to it, unconstitutionally regulated and burdened interstate commerce. This Court ruled against that contention and held that the effect of the law on interstate commerce was incidental and not forbidden by the Constitution, in the absence of regulation by Congress. This Court said on page 351:

> "The grant of the power of regulation to the Congress necessarily implies the subordination of the states to that power. This Court has repeatedly declared that the grant established the immunity of interstate commerce from the control of the states respecting all those subjects embraced within the grant which are of such a nature as to demand that if regulated at all, their regulation must be prescribed by a single authority. But in matters requiring diversity of treatment according to the special requirements of local conditions, the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. * * * Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. * * * [p. 352] The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of the transaction the respondent engages in conserving and transporting its own property. * * * [p. 353] If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or part of

the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

Except for the fact that *Eisenberg* was concerned with producer prices, the situation there involved the converse of that in the instant case. The principles discussed in that case are alike applicable to the activity involved here which is irrefutably essentially local in Virginia. *Eisenberg*, then, is clear authority in support of the judgments below.

Of the above discussed cases it may be said by way of summary and abstract analysis that:

As to *interstate* milk:

1935 *Seelig:* The state in which the distributor wanted to sell its milk could not *exclude* that milk to protect and advance local economic interests.

1936 *Agnew:* The state in which a distributor wishes to sell its milk has the power to regulate the price of the sale.

1939 *Eisenberg:* The state in which the distributor purchased the milk from producers has the power to regulate the price of the purchase.

1949 *Hood:* The state from which the distributor wished to take its milk could not *withhold* the milk to protect and advance local economic interests.

Or, stated otherwise.

As to *interstate* milk:

The state in which the distributor makes the transaction has the power to control that transaction by regulating the price.

Agnew
Eisenberg

The state in which the distributor wishes to make a transaction cannot prevent the making of that transaction (on grounds of local economic self interest) by *excluding* the milk.

Seelig

The state in which a distributor transaction is *not* made cannot prevent the making of that transaction (on grounds of local economic self interest) by withholding the milk.

Hood

It is submitted that there runs through these cases a thread of consistency which to be maintained requires that this court affirm the judgment below.

III.

The Validity of the Virginia Act and the Regulation Promulgated Thereunder As Administered By the State Milk Commission Is Unimpaired by the Agricultural Marketing Agreement Act.

The appellants apparently argue that by reason of the mere adoption of the Federal Agricultural Marketing Agreement Act, 7 U. S. C. § 601, *et seq.*, and the erstwhile (1945-47) regulation thereunder of producer prices in the Arlington area, (R. 7-31, 10, 30) the State of Virginia is without power to fix the minimum sales price of milk sold and delivered in the Arlington-Alexandria area by District of Columbia distributors. Appellants' precise position in this connection seems, to the respondent at least, rather

obscure, as does the line of reasoning employed in support thereof. It is submitted, however, that appellants' contentions are wholly without merit.

The problem involved is one which cannot be resolved, as appellants seem to imply it can, by the rigid application of generally framed tests. It is one which calls for a determination of how far a particular Federal regulation supersedes state legislation, and that determination must be made by accommodating the competing demands of the state and national interests involved, just as similar considerations are determinative of the question whether a particular state regulation does or does not unduly hamper the freedom of interstate commerce.

In the first place, the Federal Act is not presently in force in the Arlington-Alexandria market area and the Act becomes effective only if a program is ordered by the Secretary of Agriculture. *Parker* v. *Brown*, 317 U. S. 341, 353. These considerations alone would seem to be dispositive of the entire question.

Appellants, however, assert that "The fact that Federal regulations have not been made effective does not result in conferring jurisdiction upon the state". That argument apparently presupposes that the regulation of the milk industry is a subject which inherently requires a uniform national rule or a uniform system of regulation, and hence a subject the power to regulate which is exclusively reserved to Congress. But such is not the case. The milk industry is inherently such that local diversity of treatment is imperative. It will not admit of uniformity of treatment even on the state level, let alone the Federal.[1]

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[1] This is made abundantly clear by the words of Justice Black, dissenting in *Hood & Sons* v. *DuMond*, 336 U. S. 525, 546:

> "In determining whether a milk market is 'adequately served' the state follows a plan similar to the federal law in that both divide the country into 'marketing areas'. Under this plan, the state legislatures did not attempt to prescribe one rule applicable throughout the whole state limiting the number of milk dealers or the number of their plants. A

The power, then, to regulate the milk industry in a manner in which interstate commerce is only incidentally affected resides in the states, though subject to the paramount power, if exercised, of Congress. That the Virginia statute and regulation as applied herein lie within the legitimate ambit of the state's police power seems clear. That power, therefore, need not be "conferred".[2] It was said by this court in *Fruman* v. *Hewit*, 329 U. S. 249, 253, that:

> "A police regulation of local aspects of interstate commerce is a power often essential to the state in safeguarding vital local interests. At least until Congress chooses to enact a nationwide rule the power will not be denied to the state."

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single rule of this kind would have lacked the necessary flexibility to accommodate the varying needs of markets in different parts of the state."

And also by the language of Justice Jackson, speaking for the majority in the *Hood* case, quoted on page 25 of this brief. And by the following words of Justice Frankfurter, dissenting in *Hood*, on page 566:

> "Some of the principles relevant to decision of this case are settled beyond dispute. One of these is that the prevention of destructive competition is a permissible exercise of the police power. *Nebbia* v. *New York*, 291 U. S. 502; *United States* v. *Rock Royal Co-operative*, 307 U. S. 533; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 395. Another is that a state is not barred from licensing an activity merely because it is in interstate commerce. Even more basic is the principle that as to matters which do *not* demand that regulation be uniformly present or uniformly *absent*, see *Cooley* v. *Board of Wardens*, 12 How. 299, the state may impose its own requirements 'even though they materially interfere with interstate commerce.' *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 188. And only recently, be it noted, this Court has characterized the buying of milk for out-of-state shipment on 'essential local' business. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346, 352." (emphasis supplied)

[2] On page 35 of their brief appellants conclude with the statement "• • • that the State Milk Commission has no authority from Congress to regulate interstate milk prices, particularly in the absence of Federal regulation which was ousted by vote of the farmer-producers in 1947."

Furthermore, in *Cooley* v. *Board of Wardens,* 12 How. 298, 318, this Court said:

> "If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner convey to the states that power."

The *Cooley* case, in the words of Justice Black, dissenting in *Hood* v. *DuMond,* 336 U. S. 525, 551, decided:

> "* * * that the commerce clause *per se* only prohibited state regulation of local interstate commerce activity which 'are in their nature national, or admit *only* of one uniform system.' It was also held at p. 320 that the commerce clause left states free to regulate interstate commerce activity where diverse conditions incident to different customs, habits, and trade practices, could best be treated and regulated by different regulations 'drawn from local knowledge and experience, and conformed to local wants.'" (emphasis supplied)

Appellants argue that the "silence of Congress does not authorize the states to regulate interstate commerce".[3]

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[3] In support of this statement, appellants quote from:

(1) *Brennan* v. *Titusville,* 153 U. S. 299, at 302. But the Court there was dealing with a license tax which it deemed to be a direct burden on interstate commerce.

(2) *Bowman* v. *Chicago,* 125 U. S. 465, 485, but the quoted words were taken from a quotation in that case from *Cooley* v. *Board of Port Wardens,* 12 How. 299, which quotation in full follows:

> "The subjects indeed upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consist in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone

With that isolated statement, as generally phrased, we will not disagree and will concede that in the relations of the states to the regulation of interstate commerce by Congree there is a field in which the state cannot interfere at all, even in the silence of Congress. But it must be assumed that appellants have in mind the instant situation and, that being so, appellants seem to have overlooked the rule as stated in *Oregon-Washington Co.* v. *State of Washington*, 270 U. S. 87, 102, (cited in appellants' brief on p. 21) that:

> "[the] rule is that there is a field in which the local interests of the States touch so closely upon interstate commerce that in the silence of Congress on the subject, the States may exercise their police powers;"

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can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of the purpose that the commerce in that commodity, or by that means of transportation, shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and against the products of citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminatory state legislation."

(3) *Missouri* v. *Kansas Gas Co.*, 265 U. S. 298. But that case was concerned with natural gas, and held that the sale of it in wholesale quantities, not to consumer, but to distributing companies for resale to consumers in numerous cities in different states was wholly interstate, the paramount interest in which was national, not local, admitting of and requiring uniformity of legislation, which uniformity was necessary to preserve the equality of opportunity and treatment among the states, even though it be the uniformity of governmental non-action. Court, however, recognized that the line of division is not clearly marked between cases where, in the absence of Congressional action the state is authorized to act and those where state action is precluded by the commerce clause *per se*, and stated that, in the absence of Federal legislation, the state could constitutionally enact laws of internal police power although they may incidentally affect interstate commerce. That the regulation of the milk industry is within the latter area is clear. *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608; *Milk Control Board* v. *Eisenberg Co.*, 306 U. S. 346; and *Nebbia* v. *New York*, 291 U. S. 502.

Which rule, it is submitted, obviously applies here.

Appellants' argument, carried to its logical conclusion, is that the mere fact of the adoption of the Federal act, regardless of whether it is or is not in operation in any particular area, precludes regulation of the milk industry by *all* states in areas where those regulations only incidentally affect interstate milk. Judicial sanction of such an argument would seriously undermine the very foundation of state milk control legislation. That this court will not lend its support to such a contention was strongly indicated by its expression in *Hood & Sons* v. *DuMond*, 336 U. S. 525, *supra*, in connection with an Agricultural Marketing Agreement Act question raised there. The court said at page 542:

> "The Congressional regulation contemplates and permits a wide latitude in which the State may exercise its police powers over the local facilities for handling milk. We assume, though it is not necessary to decide that the Federal Act does not preclude a state from placing restrictions and obstructions in the way of interstate commerce for the ends and purposes always held permissible under the commerce clause."

In a field where Congress has acted the test of the validity of state action is whether the Federal legislation *necessarily* has excluded state action, *Oregon-Washington Co.* v. *State of Washington*, 270 U. S. 87, *supra*, or otherwise stated, whether the Congressional legislation manifests the intention to occupy the entire field to the exclusion of the states. Moreover, "The intention of Congress to exclude states from exerting their police power must be clearly manifested". *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 611.

Title 7 U. S. C. § 610(i) provides in part:

> "The Secretary of Agriculture upon the request of duly constituted authorities of any state is directed, in order to effectuate the declared policy of sections . . . 608 C [para. (5) of which deals with fixing milk pro-

> ducer prices] . . . of this title and in order to obtain uniformity in the formulation, administration and enforcement of Federal *and* State programs relating to the regulation of the handling of agriculture commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any state, and is authorized to *cooperate* with such authorities; * * * to issue orders . . . *complementary to orders or other regulations issued by such authorities;* * * *"* (Emphasis supplied). (See Appendix B of appellants' brief.)

There could hardly be a more positive Congressional declaration (1) that the Federal Act does not exclude the states from regulating their respective milk industries in the exercise of their police power; (2) that the Federal Act was not intended to occupy the entire field; and (3) that the act contemplated the operation side by side of state and federal programs. Indeed, the Federal act clearly envisions the operation of state regulatory programs before, during, and after administration of a Federal program. Cooperation between Federal and state authorities is specifically provided for. "Where the Government has provided for collaboration the courts should not find conflict." (*Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209.)

Speaking of the Act and the section above quoted therefrom, this Court said in *Parker* v. *Brown*, 317 U. S. 341, *supra*, at p. 354:

> "From this and the whole structure of the Act, it would seem that it contemplates that its policy may be effectuated by a state program either with or without the promulgation of a federal program by the order of the Secretary."

Cf. *Reid* v. *Colorado*, 178 U. S. 137.

There appears on page 20 of appellants' brief the statement:

> "In Virginia, of course, the regulation of retail milk prices in interstate commerce indirectly regulates the prices paid to producers, which the Federal legislation *would* directly regulate." (Our emphasis).

This seems to suggest that, were the Federal Act in force, the resultant producer price regulation thereunder would cause a direct conflict with the state program under which other than producer prices are regulated, which conflict would be fatal to the state program. Since the Federal Act, in fact, is not in effect, that question would seem to be moot, but assuming it is not moot, it is submitted that there would not exist a fatal conflict.

As a general proposition it is true that state legislation is superseded by Federal regulation where there exists a direct and positive conflict between the two, or where the conflicting regulations apply precisely to the same subject or where, though the state and Federal regulations do not cover the same subject, the necessary effect of the enforcement of the former would materially interfere with the successful application of the latter. But none of those situations is involved in the instant case. By hypothesis the regulation of producer prices would very likely affect retail prices to some extent. But to say that regulation of producer prices indirectly *regulates* retail prices, or vice versa, is misleading, and, we submit, erroneous. To regulate a price is not to affect it, but to fix it. Were the Federal Act in effect, the state and Federal programs could exist harmoniously side by side. They would have their separate spheres of operation.

The Secretary of Agriculture has expressly recognized again and again that the Agricultural Marketing Agreement Act of 1937 does not preempt the field so as to preclude state regulations. For example, the milk marketing program for the New York milk marketing area is a joint Federal-state program. The order issued by the Secretary of Agriculture for the New York milk marketing area was issued on August 5, 1938 (3 F. R. 1945), and it provided that:

> "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing pro-

visions similar to the provisions of this order and to which this order shall be complementary."

The milk marketing program for the New York metropolitan marketing area has been continued since 1938 as a joint Federal-state program. In the Federal Register of October 10, 1953 (18 F. R. 6458) the Secretary gave approval to certain amendments to that program, and the Secretary's decision states:

> "The regulatory program for the New York metropolitan marketing area is a joint Federal-State program. The Federal order and the State order are complementary, and both orders contain, in all material respects, identical provisions. In the case of the original promulgation of the orders, and each amendment to the orders, joint hearings have been held and the amendments to both orders have been identical in all material respects. This program has been administered in accordance with the principles of procedure set forth in the agreement or memorandum of understanding executed on August 26, 1938, by the Secretary of Agriculture of the United States and the Commissioner of Agriculture and Markets of the State of New York."

The contemporaneous and settled administrative interpretation and administrative practice, over a period of more than 15 years, shows that state regulation may be made effective in the absence of Federal regulation, and also state regulation may be complementary to Federal regulation. That contemporaneous and settled administrative interpretation should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson*, 280 U. S. 183, 193; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549; *Boutell* v. *Walling*, 327 U. S. 463, 470-471; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116. But emphatically the administrative interpretation and the administrative practice are in accord with the plain language of the Federal statute which ex-

pressly recognizes state regulation. Although the Federal statute vests in the Secretary of Agriculture the full reach of the commerce clause (*United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 123) and the Secretary may exert his authority to the ultimate (*Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332, 334-336 (C. A. 3), certiorari denied, 338 U. S. 905), nonetheless the Secretary may regulate not at all—as in this case—or he may provide for limited regulation. In the case at bar there is no Federal regulation in effect; and certainly in the absence of Federal regulation, state regulation is permissible. *Milk Board* v. *Eisenberg Co.*, 306 U. S. 346, 351. Also, see, *International Shoe Company* v. *Pinkus*, 278 U. S. 261, 265; *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 152.

In accordance with express recognition in the Federal Act of the authority of states to provide for regulation, numerous states have statutory enactments which authorize state boards or commissions to regulate or provide for the regulation of the marketing of milk. A holding that would nullify state regulation in this case would also strike down regulation under numerous other state statutes, see, *e.g.*, Ala. Code 1940, Tit. 22, §§ 205-231; Ark. Statutes 1947, Vol. 7, § 82-913, *et seq.*; Deering's Agr. Code of Calif., Ann., § 736.10, *et seq.*; Gen. Statutes of Conn. 1949 Rev., § 3120, *et seq.*; Fla. Statutes Ann., § 501.13, *et seq.*; Ga. Code Ann., § 42-551, *et seq.*; West's La. Statutes Ann., Tit. 40, § 898, *et seq.*; Ann. Laws of Mass., ch. 94A, § 12A; Mo. Rev. Statutes Ann. § 14124; Rev. Laws of New Hampshire, ch. 196, § 6; New Jersey Statutes Ann., Tit. 4 § 12A-22; McKinney's Consolidated Laws of New York Ann., Art. 21, § 258-m; Gen. Statutes of North Carolina Ann., ch. 106, § 262; Oregon Comp. Laws Ann., Tit. 34, § 1012; Purdon's Pennsylvania Statutes Ann., Tit. 31, §§ 700j-806; Utah Code Ann. 1953, ch. 5, §§ 2-4 and 3-11.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Court should dismiss this appeal, or, in the alternative, affirm the judgment below.

Respectfully submitted,

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